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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-6630

ALICE C. ROCHE, ET AL, Appellant,

V.

BIG MOOSE OIL FIELD TRUCK SERVICE, ET AL, Appellee

Appeal from the Supreme Court of Louisiana

Statement as to Jurisdiction

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BIG MOOSE OIL FIELD TRUCK SERVICE, ET AL, Appellee

Appeal from the Supreme Court of Louisiana

Statement as to Jurisdiction

Opinion Below

The Supreme Court of Louisiana issued its opinion in this case on February 15, 1980. The opinion is not yet reported and has been reprinted at pages 31-47 to the Joint Appendix filed herewith. Application for Rehearing was denied in this case on April 7, 1980 as noted in the Appendix, infra page 48.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(2)[1], this being an appeal which draws into question

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[1] "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

...(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

the validity of LSA - Civil Code, Article 2315 infra, page on the ground that it is repugnant to the Constitution of the United States.

Appellant, Alice C. Roche, instituted suit in the Fifteenth Judicial District Court, State of Louisiana on December 3, 1976, individually and as natural tutrix of her two (2) minor twin children, William and Dawn Roche, as the result of the wrongful death of Joseph D. Roche. Appellees filed an exception as to the right of the two (2) minor children to bring a wrongful death action pursuant to LSA - Civil Code Article 2315, since on the date that Joseph D. Roche was killed, the two (2) children were in the process of being adopted by Appellant, Alice C. Roche, and the decedent, Joseph D. Roche, and a final adoption decree had not yet been rendered by the State District Court.

This decision was affirmed by the Third Circuit, Court of Appeal, State of Louisiana, as reported at 371 So. 2d 1374 (1979) and as set forth in the Appendix, infra pages 20-30.

On February 15, 1980, the Supreme Court of Louisiana affirmed the denial of the minor children's right to recover for Mr. Roche's wrongful death. Application for Rehearing was denied on April 7, 1980. Timely notice of appeal to this Court was filed in the Supreme Court of Louisiana on May 5, 1980.

As the Supreme Court of Louisiana rejected Appellant's challenge to LSA - Civil Code Article 2315, this matter is appropriately brought to this Court by appeal. See Levy vs. Louisiana, 88 S. Ct. 1509 (1968).

In the event that the Court does not consider appeal the proper mode of review, Appellant requests that this application for an appeal be regarded and acted upon as a petition for writ of

certiorari pursuant to 28 U.S.C., Section 2103.[2]

Constitutional and Statutory Provisions Involved

This case involes the Fourteenth Amendment to the Constitution of the United States.[3]

This case also involves LSA - Civil Code Article 2315 which states:

> "Liability for acts causing damage; survival of action - Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.
>
> "The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

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[2]"Appeal from State court or from a United States court of appeals improvidently taken regarded as petition for writ of certiorari

"If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this along shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs."

[3]"Amendment 14 - Section 1. Citizens of the United States.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted or irregular heirs, whether suit has been instituted thereon by the survivor or not.

"As used in this article, the words 'child', 'brother', 'sister', 'father', and 'mother', include a child, brother, sister, father and mother, by adoption, respectively."

Question Presented

Whether LSA - Civil Code Article 2315, which deprives individuals of the right to recover for the wrongful death of another individual on whom they were totally dependent for their subsistence, violates the Equal Protection Clause of the Fourteenth Amendment.

Statement of the Case

On August 10, 1968, Appellant, Alice C. Roche, married the decedent, Joseph D. Roche. There were no natural children born of this union. However, on April 21, 1972, two (2) minor children, namely, William Donald Robinson and Dawn Rachelle Robinson, were placed in foster care in the home of Appellant, Alice C. Roche, and Joseph D. Roche, by the Louisiana Health and Human Resources Administration, Division of Family Services, and the two (2) children have remained in the Roche home since that time.

The aforementioned minor children were born as twins on January 17, 1969, in Lake Charles, Louisiana, to their natural

unwed mother who subsequently abandoned the children. Following the placement of William and Dawn in the Roche home by the Division of Family Services, the Fourteenth Judicial District Court, State of Louisiana, issued an Order on May 31, 1974, declaring the twins to be legally abandoned and placing the children in the custody of the Agency.

On November 19, 1975, Appellant, Alice C. Roche, and Joseph D. Roche applied for the adoption of the aforenamed minor children in the Juvenile Court of the Fifteenth Judicial District Court, State of Louisiana. The Division of Family Services filed its confidential report on the adoption request of Mr. and Mrs. Roche on December 19, 1975. The Final Decree of Adoption of William and Dawn (Robinson) Roche unto Mr. and Mrs. Roche was granted in this matter on January 5, 1976.

On December 3, 1975, between the filing of the petition for adoption and the rendition of the final Adoption Decree, Joseph D. Roche was killed while employed by Appellee, Fred Wilson Drilling Company, Inc. At the time of his death, Mr. Roche was employed as a roustabout on an oil, gas and/or mineral well in Evangeline Oil Field, Acadia Parish, Louisiana. While working at the aforementioned rig on December 3, 1975, Joseph D. Roche was instructed by an employee of Appellee, Big Moose Oil Field Truck Service, Inc., to assist in the unloading of drill collars on the well site. Mr. Roche was violently crushed by these drill collars during the unloading process, causing his death.

Appellant, Alice C. Roche, instituted suit in this matter against Big Moose Oil Field Truck Service, Inc., Gardner LaCombe, Reliance Insurance Company, David Fite, L. J. Guidroz, Clyde Johnson, Fred Wilson, Liberty Mutual Insurance Company and Joe Doe,

as defendants, liable jointly and in solido for the wrongful death of Joseph D. Roche.

Before a trial on the merits could be heard in this case, Appellees filed an exception in the district court on the basis that LSA - Civil Code Article 2315 did not provide a right of action to the two (2) minors since the adoption decree in this case had been issued after Mr. Roche's death.

The trial court sustained the exception and on appeal, the Third Circuit, Court of Appeals, State of Louisiana, affirmed the decision. The Louisiana Supreme Court held on February 15, 1980 that this denial of a right of action on behalf of the two (2) minor children for the wrongful death of Mr. Roche pursuant to LSA - Civil Code Article 2315 was not discriminatory or unconstitutional.

How the Federal Questions were Raised and Decided Below

Appellant has consistently challenged the discriminatory application of LSA - Civil Code Article 2315 from the district court hearing in this matter through both stages of the State Appellate Judicial System. At each stage of these proceedings, Appellant's attack of this statute was struck down.

The majority of the Louisiana Supreme Court squarely rejected Appellant's contention. However, the dissenting opinion strongly attacked the majority's discriminatory application of LSA - Civil Code Article 2315 with the following language:

> "Because of the wrongful act of another, the children in the present case were injured. They were deprived of support, love and affection, and of a father. Although they may not fit technically within any of the present categories of 2315 I believe that an examination of the purpose of the statute would require that person who caused the damage to repair it.
>
> "Moreover, the majority's interpretation of Article 2315 renders it unconstitutional.

"Although I appreciate the difficulty in conceptualizing a class including the children, it seems to me that dependent minors undergoing virtually certain adoption, absent the death of the adoptive parent, do form a legitimate category deserving of equal protection of the laws -- at least as deserving as independent major illegitimate children who may have never known their deceased parent. If the majority's interpretation of Article 2315 is correct, it arbitrarily, capriciously and unreasonably discriminates against the prospective adopted children because of their birth, La. Const. Art. 1, § 6, there being no rational basis to support such discrimination."

The Federal Questions are Substantial

As construed by Louisiana's highest court, LSA - Civil Code Article 2315 deprives a minor child from recovering for the wrongful death of an individual upon whom the minor is socially and economically dependent upon for subsistence. This invidious discrimination raises serious questions under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

This Honorable Court has been extremely sensitive when protecting rights of dependent minor children. In Levy vs. Louisiana, 88 S. Ct. 1509 (1968), this Court held "that denial to illegitimate children of the right to recover for the wrongful death of their mother on whom they were dependent constituted invidious discrimination against them." The Levy decision also concerned a challenge to LSA - Civil Code Article 2315. After applying the Equal Protection Clause of the Fourteenth Amendment to Louisiana's wrongful death statutory provisions, this Honorable Court held that:

"Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would.

"We conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother."

The recognition of the Constitutional rights afforded to dependent minor children were extended by this Honorable Court in Weber vs. Aetna Casualty and Surety Co., 92 S.Ct. 1400 (1972) in which this Court held that the Louisiana workmen's compensation statutes denying equal recovery rights to dependent unacknowledged illegitimate children violated the equal protection clause. In Weber, the decedent died as a result of injuries received during his employment and at the time of his death he left four legitimate minor children, as well as one unacknowledged minor child and one posthumously born illegitimate minor child. At that time, the Louisiana workmen's compensation law entitled only the legitimate minor children to benefits. However, this Court held that such a statutory scheme violated the equal protection clause and that states could not discriminate against unacknowledged illegitimate dependents or posthumously born illegitimates. Mr. Justice Powell, writing for the majority, stated "We think a posthumously born illegitimate child should be treated the same as a posthumously born legitimate child which the Louisiana statutes fail to do". In response to an attempt by the lower court in Weber to distinguish that case from the Levy decision because the latter involved tort liability and Weber concerned workmen's compensation, Mr. Justice Powell responded,

> "We do not think Levy can be disposed of by such finely carved distinctions. The Court in Levy was not so much concerned with the tortfeasor going free as with the equality of treatment under the statutory recovery scheme. Here, as in Levy, there is impermissible discrimination. An unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate later acknowledged. So far as this record shows, the dependency and natural affinity of the unacknowledged illegitimate children for their father were as great as those of the four legitimate children whom Louisiana law has allowed to recover. The legitimate children and the illegitimate children all lived in the home of the deceased and were equally dependent upon him for maintenance and support. It is inappropriate, therefore, for the court below to talk of relegating

the unacknowledged illegitimates 'to a less favorable position as are other dependent relatives such as parents.' The unacknowledged illegitimates are not a parent or some 'other dependent relative'; in this case they are dependent children, and as such are entitled to rights granted other dependent children."

The main issue in the instant proceedings concerns the claim of the minor children, William and Dawn Roche, to recover for the damages which they sustained as the result of the wrongful death of Joseph D. Roche.

LSA Civil Code Article 2315 is the only statute in Louisiana law under which these minor children would be entitled to proceed against the alleged tortfeasors for the wrongful death of Mr. Roche. This statutory provision provides that if the injured person dies, the right to recover damages caused by an offense or quasi offense shall survive in favor of certain listed persons, including "the surviving spouse and child or children of the deceased". The word "child" used within that Article includes an adopted child.[4]

Appellant, Alice C. Roche, seeks judicial recognition by this Honorable Court of the right of her two minor children to recover for the loss of support, love and affection which the children have suffered as a result of Mr. Roche's wrongful death due to the negligence of others.

Beginning on April 21, 1972, which was the day that William and Dawn Robinson Roche were placed in the Roche home by the Louisiana Health and Human Resources Administration until the time of Mr. Roche's death, the two children were

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[4] "As used in this Article, the words "child", "brother", "sister", "father" and "mother" include a child, brother, sister, father and mother by adoption, respectively.

dependent upon Joseph D. Roche for their subsistence which included income, support, love, affection and guidance. This dependency of these two children upon Mr. Roche arose from his prior contractual committments with the State of Louisiana as well as from his daily performance as the surrogate father of the two children for approximately three years.

Joseph D. Roche and his wife, Alice C. Roche, committed themselves twice through contract with the Louisiana Department of Public Welfare to provide for the care and financial support of the two minor children who had been abandoned by their natural mother.

The first of these contracts was signed on April 21, 1972. This agreement was a standard form used in all adoption cases handled by the Louisiana Department of Public Welfare. Mr. and Mrs. Roche both signed the contract as foster parents and essentially agreed to clothe, educate and care for the children.[5] The twin children remained at the Roche home and were dependent upon Mr. and Mrs. Roche for their physical and emotional existence.

Again on October 1, 1975, Mr. and Mrs. Roche renewed their contractual agreement with the Louisiana Department of Public Welfare concerning the raising of the two minor children. However, the second contract extended the previous agreement and provided that Mr. and Mrs. Roche would institute adoption proceedings and from the date of the contract, would care for the

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[5] In the standard contract agreement entered into between Mr. and Mrs. Joseph D. Roche and the Louisiana Department of Public Welfare the following language is included therein:

"In doing so we, the foster parents, agree:

to provide this child with what is necessary for a normal happy family life, including shelter, food, clothing, care, affection, training, recreation, education and religious teaching."

children as if they were their own children.[6] Mr. and Mrs. Roche signed the latter contract as adoptive parents.

This contractual committment by Mr. Roche relieved the Louisiana Department of Public Welfare, and the State, of its obligation to support these two children. This legal obligation to support the two children had been incurred by the State of Louisiana on May 31, 1974, when the children were declared legally abandoned by a Louisiana State District Court in Calcasieu Parish, Louisiana. When Mr. Roche was killed on December 3, 1975, the children lost their present and future source of support. As a result of the discriminatory application by Louisiana Courts of LSA Civil Code Article 2315, these two children are now deprived of a legal remedy to recover against the tortfeasors who were responsible for their real and actual loss of their social and economic subsistence which Mr. Roche provided them during his lifetime. In Levy, supra, this Court posed the question "why should the illegitimate child be denied rights merely because of his birth out of wedlock?" Appellant, Alice C. Roche, poses a similar question in that why should a child who is dependent upon a man and who is in the

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[6] In the standard contract agreement entered into between Mr. and Mrs. Joseph D. Roche and the Louisiana Department of Public Welfare, the following language is included therein:

> "In doing so we agree:
>
> to care for this child in all respects as if he were our own child, assuming full responsibility for his needs;
>
> if we decide to adopt this child, to wait to file adoption papers until we have the Department's agreement on this action; but, on this agreement being reached, to file a final petition not less than six months and not more than eighteen months after placement;
>
> if, at any time, we decide not to continue with our plan of adopting this child, to return him to the care of the Department of Public Welfare rather than make independent plans for him;"

legal process of being adopted by that man be denied the rights to recover for the man's wrongful death merely because the man dies before the final adoption decree is rendered as a result of State Statutory delays.

The exact language of the wrongful death provisions of LSA Civil Code Article 2315 provides three possible classes of beneficiaries, namely, surviving spouse and child or children, father and mother, or brothers and sisters.

Appellant, Alice C. Roche, submits that the State of Louisiana has been discriminatory in its application and interpretation of the wrongful death provisions of LSA Civil Code Article 2315. This discrimination violates the Equal Protection Clause of the Fourteenth Amendment as to a class of citizens.

In King vs. Cancienne, 316 So.2d 366 (1975), the Louisiana Supreme Court held that a putative spouse[7] had a right to recover for the wrongful death of her putative husband even though she did not technically fit within any of the categories of LSA Civil Code Article 2315. The marriage had been declared a legal nullity and there was no legal or biological relationship between the deceased and the petitioner but the Court arbitrarily decided that the petitioner should be given a right of action under LSA Civil Code Article 2315 even though she did not fit into any of the three categories listed in that statute.

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[7] LSA-Civil Code Article 117:

"The marriage, which has been declared null, produces nevertheless its civil effects as it relates to the parties and their children, if it has been contracted in good faith."

LSA-Civil Code Article 118:

"If only one of the parties acted in good faith, the marriage produces its civil effects only in his or her favor, and in favor of the children born of the marriage".

The wrongful death provisions of LSA Civil Code Article 2315 have also been arbitrarily expanded to include posthumously born children. In Hamilton v. Canal Barge Company, Inc., 395 F. Supp. 978 (1975), the right of a posthumously born child to recover under LSA Civil Code Article 2315 was at issue before the Court. In that case, an employee of Petrolane Offshore Construction Service, Inc. was killed in the course of his employment when a part of a mooring bit on a barge broke off. The employee was only engaged to be married at the time of the death. After his death, his fiancee learned from her doctor that she was two months' pregnant. The wrongful death action brought on behalf of the unacknowledged illegitimate minor child was upheld by the Court. The Court held that "a posthumous child may recover for the wrongful death of his parent; the important issue is whether the decedent was the parent, not the date when the child was born."

The Louisiana Supreme Court expanded the application of LSA Civil Code Article 2315 in Warren v. Richard, 296 So.2d 813 (1974). In that case, the Court held that "an illegitimate child could recover for the wrongful death of her biological father though, at the same time, she was also the legitimate child of another man under the provisions of LSA Civil Code Article 184.[8] This decision gave one child two wrongful death actions and that Honorable Court cited language indicating that the child should not be punished for his birth or legal classification.

In the instant case, Mr. and Mrs. Roche instituted legal adoption proceedings in State District Court a few weeks before Mr. Roche was killed and within one month after his death a Final Adoption Decree was rendered by the Court. William and Dawn became the legal children of Mr. and Mrs. Roche in much the

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[8] "The law considers the husband of the mother as the father of all children conceived during the marriage."

same manner as if they had been in Mrs. Roche's womb at the time of her husband's death. In both instances, a legal relationship was acquired after the decedent's death.

The Louisiana Supreme Court's refusal to recognize dependent minors undergoing virtually certain adoption as beneficiaries within LSA - Civil Code Article 2315 is arbitrary, capricious and unreasonably discriminatory and violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Conclusion

For the foregoing Reasons, Probable Jurisdiction should be noted.

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APPENDIX

APPENDIX A

Opinion and Judgments of the Fifteenth Judicial District Court for the Parish of Acadia, State of Louisiana..... 16

APPENDIX B

Opinion and Judgment of the Court of Appeal, Third Circuit, State of Louisiana..... 20

APPENDIX C

Opinion, Judgment and Denial of Rehearing of the Supreme Court of Louisiana..... 31

ALICE C. ROCHE, ET AL	:	15TH JUDICIAL DISTRICT COURT
VERSUS	:	NUMBER 40,732
BIG MOOSE OIL FIELD TRUCK SERVICE, INC., ET AL	:	ACADIA PARISH, LOUISIANA

REASONS FOR JUDGMENT

On December 3, 1975 Joseph Roche was killed while in the employ of Fred Wilson Drilling Company, Inc. This suit was filed by the widow individually and as a natural tutrix of two (2) minor children who were residing with the plaintiff and the decedent at the time of his death but were not biological children of either, the plaintiff or the decedent.

A petition for adoption of the children had been filed, however, no interlocatory decree was entered and the final decree of adoption was rendered January 5, 1976, after Mr. Roche's death. The court concludes that there is no cause or right of action in the children for Mr. Roche's death. See Bertrand vs. State Farm Fire and Casualty Company, 333 So.2d 322; Simmons vs. Brooks, 342 So.2d 236; and In re Spraggins, 234 So.2d 462.

The defendants have filed a suit stating that Act 147 of 1976 barring executive officers suit should be applied retroactively. The courts have now held that it is not to be applied retroactively and therefore, this exception is denied.

The court also reluctantly concludes that R.S. 23:1102 requires that the plaintiff in this suit should be required to intervene in the suit filed by the employer and his insuror. This court is not pleased with the results brought about by

the provisions of R.S. 23:1102, however, this court feels bound to reach this conclusion.

Costs of court to be borne by the plaintiff.

Appropriate judgment will be signed upon presentation.

Reasons rendered at Lafayette, Louisiana this 31 day of July, 1978.

Douglas J. Welsh
DISTRICT JUDGE

ALICE C. ROCHE, ET AL	:	15TH JUDICIAL DISTRICT COURT
VS. NO. 40,732	:	STATE OF LOUISIANA
BIG MOOSE OIL FIELD TRUCK SERVICE, INC., ET AL	:	PARISH OF ACADIA
	:	
Filed: _____	:	_____ DEPUTY CLERK OF COURT

* * *

J U D G M E N T

This cause was heard on two Exceptions of No Cause or Right of Action filed on behalf of defendants, David Fite, L. J. Guidroz, Clyde Wilbert Johnson, Fred Wilson and Liberty Mutual Insurance Company; the Court considering the pleadings and law applicable, and for written reasons assigned July 31, 1978:

ORDERED that the Exception of No Cause or Right of Action relating to the claims asserted on behalf of William Donald Roche and Dawn Rachelle Roche, is sustained and both claims dismissed with prejudice.

FURTHER ORDERED that the Exception of No Cause or Right of Action relating to the applicability of Act 147 of 1976 is overruled.

JUDGMENT RENDERED on July 31, 1978.

JUDGMENT SIGNED at Lafayatee, Louisiana on the 10 day of August, 1978.

Douglas J. Nehrbass
DOUGLAS J. NEHRBASS
District Judge

FILED 8-30-1978
Barbara Daigle
DEPUTY CLERK OF COURT
CROWLEY, ACADIA PARISH, LA.
A TRUE COPY-ATTEST

ALICE C. ROCHE, ET AL.	:	15TH JUDICIAL DISTRICT COURT
V. NO. 40,732	:	STATE OF LOUISIANA
BIG MOOSE OIL FIELD TRUCK SERVICE, INC., ET AL.	:	PARISH OF ACADIA

FILED: _____ _____
DEPUTY CLERK

J U D G M E N T

This cause was heard on a Preemptory Exception urging the exception of no Right of Action and the Preemptory Exception urging the Exception of No Cause of Action filed on behalf of defendants Big Moose Oil Field Truck Service, Inc., and Reliance Insurance Company;

The Court considering the pleadings and the applicable law, and for written reasons assigned July 31, 1978:

IT IS HEREBY ORDERED, that the Preemptory Exception urging the Objection of No Right of Action on behalf of the minors, William Donald Roche and Dawn Rachelle Roche be, and it is hereby sustained, dismissing those claims with prejudice.

IT IS FURTHER ORDERED that the Preemptory Exception raising the objection of No Cause of Action on the grounds of plaintiff filing a separate suit instead of intervening in the pending suit filed by the workmen's compensation insurer be and it is hereby maintained, and her lawsuit herein be dismissed without prejudice, all at her cost.

JUDGMENT RENDERED on July 31, 1978.

JUDGMENT SIGNED at Lafayette, Louisiana, the 9th day of October, 1978.

Douglas J. Hebert
DISTRICT JUDGE

FILED 10-17 19 78
Brenda Hebert
DEPUTY CLERK OF COURT
CROWLEY, ACADIA PARISH, LA.
A TRUE COPY - ATTEST

NUMBER 6988

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

ALICE C. ROCHE, ET AL. — Plaintiff & Appellant

VERSUS

BIG MOOSE OILFIELD TRUCK SERVICES, INC., ET AL. — Defendant & Appellee

Appeal from the Fifteenth Judicial District Court for the Parish of Acadia, Judge Douglas J. Nehrbass presiding

Before Culpepper, Domengeaux and Guidry, Judges

Culpepper, Judge

This is a wrongful death action. The plaintiff, Mrs. Alice C. Roche, sues individually and as "natural tutrix" of the minors, William Donald Roche and Dawn Rachelle Roche, alleged adopted children of plaintiff and her husband, Joseph Daniel Roche. Mr. Roche was killed on December 3, 1975 while working as a roustabout for Fred Wilson Drilling Company, Inc. He was crushed when a load of heavy steel drill pipes fell from a truck owned by Big Moose Oilfield Truck Services, Inc. Named as defendants are Big Moose Oilfield Truck Services, Inc., Gardner LaCombe, driver of the truck, and their insurer, Reliance Insurance Company, all of whom are hereinafter referred to as the "Big Moose defendants". Also named as defendants are certain executive officers and employees of Fred Wilson Drilling Company and their insurer, Liberty Mutual, hereinafter referred to as the "Fred Wilson defendants".

The Fred Wilson defendants filed two exceptions. The first alleges the minor children have no right or cause of action for the death of Mr. Roche because the final decree of adoption

of the children was not until January 5, 1976, approximately one month after the death of Mr. Roche. The second exception by the Fred Wilson defendants is that plaintiff has no cause of action because Act 147 of 1976, which abolishes the so-called "executive officer" actions, applies retroactively to this 1975 accident.

The Big Moose defendants also filed two exceptions. The first is the same as that filed by the Fred Wilson defendants, i.e., that the minor children were not finally adopted by Mr. Roche before his death. The second exception by the Big Moose defendants alleges that Mrs. Roche has no cause or right of action to file the present suit, since her sole remedy is to intervene in the prior suit filed by Fred Wilson's workmen's compensation insurer against Big Moose to recover workmen's compensation benefits paid. In support of this second exception, the Big Moose defendants cite LSA-R.S. 23:1102 as authority for the contention that once an action is filed by the employer or the employer's insurer under LSA-R.S. 23:1101, then the employee or his heirs must intervene in that suit or else be barred from recovery.

All of these exceptions by both sets of defendants were heard on the same date, May 1, 1978, and were taken under advisement. On July 31, 1978, the district judge rendered written reasons holding: (1) The children have no right of action since the adoption was not final; (2) Act 147 of 1976 barring executive officer suits is not retroactive; (3) Mrs. Roche has no cause of action in the present suit since under R.S. 23:1102 she must intervene in the prior suit filed by the workmen's compensation insurer against the tort feasors.

Pursuant to the written reasons rendered on July 31, 1978, a judgment was rendered and signed on August 10, 1978 in favor of only the Fred Wilson defendants sustaining their exception of no right of action as to the minor children but overruling their exception as to the retroactive effect of Act 147 of

1976. On October 9, 1978, a separate judgment was rendered sustaining both exceptions urged by the Big Moose defendants.

On November 3, 1978, plaintiffs obtained an order for an appeal from the judgment "rendered herein on July 31, 1978 and read and signed in Chambers on October 9, 1978." The motion and order for appeal does not expressly mention the judgment rendered on August 10, 1978, but the motion does pray that ultimately judgment be rendered in plaintiff's favor against all defendants.

The issues on appeal are: (1) Are both the judgment of August 10, 1978 in favor of the Fred Wilson defendants and the judgment of October 9, 1979 in favor of the Big Moose defendants before us on appeal? (2) Do the minor children have a right of action for the wrongful death of Mr. Roche where the final decree of adoption had not been signed before his death? (3) Under LSA-R.S. 23:1102, is Mrs. Roche required to intervene in the prior suit by the workmen's compensation insurer against the tort feasors rather than proceed in her present separate suit?

VALIDITY OF APPEAL AS TO FRED WILSON DEFENDANTS

The Fred Wilson defendants have not filed a motion to dismiss the appeal as to them, but they did file a brief contending that plaintiff did not appeal from the judgment of August 10, 1978 dismissing the claims of the two children against them, and that since the delays for appeal from that judgment have now elapsed the judgment is final.

At the outset, we notice that the motion and order filed by the plaintiff on November 3, 1978 is only for a suspensive appeal, and a bond was fixed in the sum of $100, but no such bond was ever furnished. Jurisprudence has established the rule that although the motion and order is for a suspensive appeal only, if the bond fixed is not filed within the delay for a suspensive

appeal but is filed within the delay for a devolutive appeal, the appeal will be sustained and treated as a devolutive appeal. Succession of Garrett, 288 So.2d 657 (3rd Cir. 1974). Under LSA-C.C.P. Article 2087, the delay for taking a devolutive appeal in the present case is within sixty days of the expiration of the delay for applying for a new trial, and thus is timely. Furthermore, under LSA-C.C.P. Article 2124, as amended by Act 176 of 1977, no security is required for a devolutive appeal, and thus none was required for a devolutive appeal in this case.

The question is whether the motion and order for appeal filed on November 3, 1978 constitutes an appeal from both the judgment of August 10, and the judgment of October 9, 1978. If it does not, the judgment of August 10, 1978 is now res judicata and is not before us.

The problem is difficult. There are early cases which support the argument of the Fred Wilson defendants that since the November 3 motion and order for appeal does not expressly state that it is an appeal from the August 10, 1978 judgment, no appeal has been taken from that judgment. For instance, in In Re Guardian Homestead Association, 199 La. 216, 5 So.2d 751 (1942), which was a liquidation proceeding against an association, one judgment was rendered for the liquidator's special agent for his services, and another judgment was rendered for the liquidator's attorneys for their services, but there was only one motion and order for appeal which stated it was from the judgment in favor of the agent and the attorneys, without otherwise identifying the judgment appealed by date. Our Supreme Court dismissed the appeal on the basis that the motion and order did not sufficiently identify the judgment appealed. The court cited In Re Liberty Homestead Association, 198 La. 1068, 5 So.2d 353 (1941) and Pichon v. Pichon Land Company, 174 La. 77, 139 So. 764,

which also support the view that the motion and order for appeal must clearly identify the judgment appealed, as, for example, by date and by names of the appellees.

On the other hand, there are several cases which support the appellant. In Kirkeby-Natus Corporation v. Campbell, 250 La. 868, 199 So.2d 904 (1967) a money judgment in favor of the plaintiff was read and signed on March 25, 1965. Defendant moved for a new trial, which was denied on July 6, 1965. In his motion and order for appeal, the defendant described the judgment by amount and by parties, but he erronesouly gave the date as July 6, 1965. After first stating the general rule that appeals are favored and should not be dismissed except for "substantial causes", the court held that since the judgment overruling the motion for a new trial was not appealable, the only appealable judgment was that rendered on March 25, 1965, and that it was obviously the intention of the defendant to appeal from the judgment on the merits. The opinion states: "It is apparent that the allegation in the petition relating to the judgment rendered on July 6, 1965 was an inadvertent error which was neither misleading nor prejudicial to anyone involved in the litigation." The motion to dismiss the appeal was denied. This decision was followed in several later cases, including Fruehauf Trailer Company v. Baillio, 252 La. 181, 210 So.2d 312 (1968) and Smith v. Hartford Accident & Indennity Company, 254 La. 341, 223 So.2d 826 (1969).

The most recent case on the issue is Mirambell v. Lucien J. Caruso, Inc., 365 So.2d 1196 (4th Cir. 1979), where one of two defendants filed an exception of prescription, and the trial court, by mistake, maintained the exception as to both defendants in a judgment signed on February 15, 1978. On February 23, the second defendant filed an exception of prescription.

Also on February 23, plaintiffs moved for a new trial, complaining, inter alia, about the dismissal of the second defendant in the February 15 judgment. Both the motion for new trial and the second defendant's exception of prescription were heard on March 10. The motion for a new trial was denied and the second defendant's exception of prescription was sustained on March 10, and a judgment to this effect was rendered on March 28. On May 5, plaintiff moved for an appeal from the judgment of February 15 "and from the motion for a new trial denied on the 10th day of March, 1978." In the Court of Appeal, the second defendant moved to dismiss the appeal as to him on the grounds that no appeal had been taken from the March 28 judgment against him. The Fourth Circuit Court of Appeal denied the motion, stating: "The evident intent of this appeal was to obtain reversal of the dismissal of the second defendant (as well as of the dismissal of the first). Plaintiffs' motion for appeal included the March 10 ruling that later entered into the March 28 judgment, and gave the second defendant ample notice that plaintiffs were continuing the pursuit of the second defendant. The case is thus comparable to those in which an appeal purporting to be from the judgment denying a new trial was held to constitute an appeal from the principal judgment."

We express no opinion as to the correctness of Mirambell. It went farther than any case from our Supreme Court in holding that where the appellant intended to appeal a separate judgment which, through inadvertent error, was not described in the motion or order of appeal, the appeal from the separate judgment will nevertheless be entertained where no one was misled nor prejudiced. If we were to entertain the appeal at issue here, we would have to go even farther than Mirambell. In the present case, as in Mirambell, Mrs. Roche intended to appeal both the judgment of August 10 sustaining the exception filed by the Fred Wilson defendants, as well as the judgment of October 9, 1978 sustaining the exceptions filed by the

Big Moose defendants. However, the present case differs from Mirambell in that here the exceptions filed by the Fred Wilson defendants were different from those filed by the Big Moose defendants, whereas in Mirambell the exceptions filed by the two defendants were the same, i.e., prescription. Furthermore, if we entertain an appeal from the judgment in favor of the Fred Wilson defendants, these defendants will be prejudiced, because if the judgment sustaining their exception as to the right of action of the minor children was not properly appealed, the issue of their liability to the minor children is now res judicata.

Although we recognize the rule that appeals are favored, there is also the rule expressed in the above cited Supreme Court cases that there must be certainty and definiteness as to what judgment is being appealed, because many important rights are affected. We think it would be a dangerous precedent to hold in the present case that there was an appeal from the judgment in favor of the Fred Wilson defendants.

RIGHT OF ACTION OF THE MINOR CHILDREN

The next issue is whether the minor children have a right of action for the wrongful death of Mr. Roche under LSA-C.C.P. Article 2315, which provides that if the injured person dies the right to recover damages caused by an offense or quasi offense shall survive in favor of certain listed persons, including "the surviving spouse and child or children of the deceased." The article also provides: "As used in this article, the word 'child', . . . includes a child, . . . by adoption."

The facts are that Mr. and Mrs. Roche were married in 1968 and had no natural children. In 1974, the Juvenile Court for the Parish of Calcasieu decreed the children to be abandoned and awarded their custody to the Louisiana Health & Social and Rehabilitation Services Administration for placement by the agency in the best interest of the children. The children were placed by the agency in the home of Mr. and Mrs. Roche. On November 19, 1975, Mr. and Mrs. Roche applied to the Juvenile Court for the Parish of Acadia for adoption of the children in compliance with LSA-R.S. 9:421, et seq. The hearing on the final decree of adoption was set for January 5, 1976. Mr. Roche was killed on December 3, 1975.

In Bertrand v. State Farm Fire & Casualty Company, 333 So.2d 322 (3rd Cir. 1976), a two-year old child drowned in an oxidation pond. The natural mother had surrendeded the child to the child's maternal grandparents for adoption, and the grandparents had obtained an interlocutory decree of adoption, but the final decree had not been granted. We held under LSA-C.C. Article 2315 that since the final decree of adoption had not been granted the grandparents had no right of action, and that the natural mother had not lost her right of action. We cited cases holding the general rule that adoption is a creature of statutory law in derogation of the rights of natural children and parents, and therefore must be strictly construed. Rodden v. Davis, 293 So.2d 57β (3rd Cir. 1974) and the cases cited therein.

The rationale of Bertrand is controlling in the present case. We affirm the holding by the trial judge that the minor children have no right of action under Article 2315.

Mrs. Roche argues that because the children were adopted by her shortly after Mr. Roche's death, they should be treated in the same manner as posthumous children. Plaintiff also arques that since Mr. Roche intended to adopt the children, Article 2315 should be extended to include them. For the reasons set out above and more fully explained in the opinion in Bertrand, we reject these arguments.

MANDATORY DUTY OF MRS. ROCHE TO INTERVENE IN PRIOR SUIT BY WORKMEN'S COMPENSATION INSURER

The final issue on appeal is whether Mrs. Roche is required to intervene in the workmen's compensation insurer's prior suit under LSA-R.S. 23:1102 which provides:

> "If either the employee or his dependent, or the employer, brings suit against a third person as provided in R.S. 23:1101, he shall forthwith notify the other in writing of such fact and of the name of the court in which the suit is filed, and such other may intervene as party plaintiff in the suit." (Emphasis supplied)

The facts are that on December 2, 1976 the workmen's compensation insurer for Mr. Roche's employer filed suit against the Big Moose defendants under LSA-R.S. 23:1101 to recover workmen's compensation benefits paid. The present suit was filed by Mrs. Roche on December 3, 1976.

Athough LSA-R.S. 23:1102 provides that if either the employee or the employer bring suit against a third person, the other "may" intervene, jurisprudence has established the rule that the employer's failure to intervene after proper notice bars him from bringing a separate suit against the third party. Todd-Johnson Drydocks v. City of New Orleans, 55 So.2d 650 (Orl. App. 1951); Marquette Casualty Company v. Brown, 235 La. 245, 103 So.2d 269 (1957); National Surety Corporation v. Standard Accident Insurance Company, 281 So.2d 848 (1st Cir. 1973), writ denied 348 So.2d 336.

Whether the same rule applies to the employee has not been clearly established in our jurisprudence. There is dicta in several cases suggesting that the rule applies to the employee as well as the employer. For example, in National Surety Corporation v. Standard Accident Insurance Company, supra, our Supreme Court held that a suit by the employer's compensation insurer against the third party tort feasor interrupted prescription as to a suit filed by the employee more than one year after the accident for the reason that there is only one cause of action under R.S. 23:1101. In dicta, the court stated:

> "LSA-R.S. 23:1101, 23:1102, 23:1103, supra, do not set forth whether the injured employee or employer or the employer's insurer shall sue first; when one files suit, however, the other, if he desires recovery must intervene. The intervention is incidental despite that it is filed by the employee. Article 1031, LSA-Code of Civil Procedure, supra."

Also, in Marquette Casualty Company v. Brown, supra, where the question was whether a suit by the employer interrupted prescription as to a later suit by the employee, the court stated:

> "In addition, whenever a suit is brought against the tortfeasor by either the employer or the injured employee, the statute requires that the plaintiff give notice to the other interested party. Accordingly, should the injured employee institute suit, the compensation paying employer, upon notification thereof, no longer has the right to bring an independent action; he must intervene in the employee's suit or his right to reimbursement for compensation will be lost."

This language in Marquette Casualty Company implies that regardless of whether the employer or the employee files suit first, the other must intervene or his right of action will be lost. One policy reason suggested as supporting this rule is that the third party tort feasor has a right to have his liability fixed in one proceeding.

In his written reasons, the trial judge states he "reluctantly" concludes the present jurisprudence requires the plaintiff to intervene in the prior suit filed by the employer's insurer. The trial judge was probably of the view that LSA-R.S. 23:1102 was intended by the legislature to protect the employer from losing his indemnification in the event of a suit by the employee against the third party tort feasor. Since the employee does not need similar protection of his rights against the tort feasor, the legislature may not have intended that the employee's right to sue the tort feasor be restricted to intervention in the event of a prior suit by the employer. Nevertheless, the present jurisprudence of our Supreme Court supports the trial judge's holding.

A final matter which should be mentioned is that the Fred Wilson defendants requested in their brief that in the event we find the August 10, 1978 judgment in their favor is before us on appeal, they be given the opportunity to file a brief on the

merits, which they have not yet done. Since we hold the August 10, 1978 judgment was not appealed, there is no need for briefs by the Fred Wilson defendants on the merits of the right of action of the minor children.

For the reasons assigned, the judgment appealed is affirmed. All costs of this appeal are assessed against the plaintiff-appellant.

AFFIRMED.

FEB 15 1980

SUPREME COURT OF LOUISIANA

ALICE C. ROCHE, ET AL

VERSUS

NO. 65,285

BIG MOOSE OIL FIELD TRUCK SERVICE, ET AL

On Writ of Certiorari or Review to the Court of Appeal
Third Circuit
Parish of Acadia

CALOGERO, Justice

This is a wrongful death action by a surviving wife, individually and as tutrix of her adopted children, for the death of her husband and the children's prospective adoptive father who was killed while unloading a truck owned by Big Moose Oilfield Truck Services. Named as one group of defendants are the driver of the truck, Big Moose, and their insurer (the Big Moose defendants). A second group of defendants includes certain executive officers and employees of Fred Wilson Drilling Company and their insurer (the Fred Wilson defendants). We granted writs (375 So.2d 658 (La. 1979)) to resolve the following issues:

1) Whether the minor children have a right of action for the wrongful death of decedent when the final decree of adoption was not rendered before his death.

2) Whether plaintiff under R.S. 23:1102 is required to intervene in the prior suit filed by

Dennis, J. concurs and assigns reasons.
Lemmon, J. concurs in part and dissents in part and assigns reasons.

the workman's compensation insurer against the tortfeasor rather than proceed in her own separate suit?

Plaintiff Alice C. Roche and the decedent Joseph Daniel Roche were married in 1968. They had no children. In 1974 the Juvenile Court for the Parish of Calcasieu decreed William David Robinson and Dawn Rochelle Robinson to be abandoned and awarded their custody to the Louisiana Health and Human Resources Administration for placement, in the best interest of the children. The children had been living with the Roches since April 21, 1972 as their foster children.

On December 2, 1976 Liberty Mutual Insurance Company, the workman's compensation insurance carrier for decedent's employer at the time of the death, filed suit in the Fifteenth Judicial District Court against the Big Moose defendants to recover compensation benefits paid. The next day the plaintiff individually and on behalf of the two minor children filed this wrongful death action, also in the Fifteenth Judicial District. Both sets of defendants filed exceptions. The trial court ruled that the minor children have no right of action because they were not adopted before Joseph Roche's death (on exceptions filed by both sets of defendants), that Act 147 of 1976 which abolished "executive officer" actions does not apply retroactively to this action (on exception of the Fred Wilson defendants alone), and that Mrs. Roche has no right or cause of action to file the present suit because her sole remedy is to intervene in the suit previously filed by the compensation insurer (on exceptions filed by both sets of defendants).

On appeal the Third Circuit affirmed the trial court's ruling that the minor children have no right of action because they were not adopted at the time of decedent's death, and affirmed the dismissal of Mrs. Roch's action on the ground that R.S. 23:1102

requires that she intervene in the compensation insurer's previously filed suit.

That court also concluded that plaintiffs had not appealed from the August 10, 1978 ruling on the exception of the Fred Wilson defendants as to the children's right of action.[1]

Footnote 1

The issue of whether the plaintiffs had appealed the ruling on the Fred Wilson defendants' exception arose in the following context: All of the exceptions of both sets of defendants were heard on May 1, 1978. On July 31, 1978, the district court judge rendered written reasons for judgment. Pursuant to the written reasons rendered July 31, 1978, the court rendered and signed a judgment on August 10, 1978 in favor of only the Fred Wilson defendants, sustaining their exception of no right of action as to the minor children but overruling their exception as to the retroactive effect of Act 147 of 1976. On October 9, 1978, a separate judgment was rendered sustaining both exceptions urged by the Big Moose defendants.

On November 3, 1978 plaintiffs obtained an order for an appeal from the judgment "rendered herein on July 31, 1978 and read and signed in Chambers on October 9, 1978." Plaintiffs' motion and order for appeal did not specifically mention the judgment rendered on August 10, 1978 on the Fred Wilson defendants' exceptions.

In the Court of Appeal the Fred Wilson defendants argued that the plaintiffs simply did not appeal from the trial court's judgment of August 10, 1978 which had dismissed the claims of the two children against them. They argued that because plaintiffs obtained an order for appeal from the judgment rendered October 9, 1978 and because the order did not mention the August 10, 1978 judgment rendered on their exception, that judgment (August 10, 1978) was final. The Court of Appeal determined that although it may have been the intention of plaintiffs to appeal both judgments (August 10, 1978 and October 9, 1978), they simply had not done so since the order of appeal only specified the October 9, 1978 judgment.

The Court of Appeal in expressing that there was no need for briefs by the Fred Wilson defendants on the merits of the right of action of the minor children, related that they were holding the August 10, 1978 judgment was not appealed. That resolution, or "holding," was not necessary to the decision since the trial court judgment maintaining the exceptions of no right of action of the minor children was affirmed. So, too, for the purpose of our review, it is unnecessary to resolve the procedural question of whether plaintiffs timely appealed the August 10, 1978 judgment maintaining the exception of no right of action urged by the Fred Wilson defendants.

To determine whether these minor children have a right of action for the wrongful death of Joseph Roche, we must examine Article 2315 of the Louisiana Civil Code which creates the survival and wrongful death actions and the classes of beneficiaries who in the order of preference may recover damages thereunder. The first class of beneficiaries includes "the surviving spouse and child or children of the deceased."

Adopted children were first included as beneficiaries by Acts 1948, No. 333, §1 which amended Article 2315 to extend the right of action to children who were adopted. The article was again amended in 1960 to its present form to provide that the word child as used in that article includes a child "by adoption."[2] Whether we can find that the word child also includes a child for whom a petition of adoption has been filed but whose adoption is not final is the issue here.

In Bertrand v. State Farm Fire and Casualty Co., 333 So.2d 322 (La. App. 3rd Cir. 1976), an analogous situation was presented. There a mother had surrendered her minor child to the child's maternal grandparents for adoption. After an interlocutory decree but before a final decree of adoption, the child drowned. Both the child's mother and his maternal grandparents sued for damages for wrongful death. The Court of Appeal held that because the grandparents were not the mother and father of the child "by adoption" within the meaning of Civil Code Article 2315 (because the final decree of adoption had not been rendered), the child's mother rather than the prospective adoptive parents had the right of action under Article 2315.

Footnote 2

Article 2315 as amended in 1960 provides in pertinent part:

> "As used in this article, the words 'child', 'brother', 'sister', 'father', and 'mother' include a child, brother, sister, father, and mother, by adoption, respectively."

It is well-settled in the jurisprudence that the right of action created by Article 2315 may be extended only to the beneficiaries named in the statute and that the classes of beneficiaries must be strictly construed. As stated in Thompson v. Vestal Lumber Manufacturing Co., 16 So.2d 594 (La. App. 4th Cir. 1943), "Upon whom [the right of action] should devolve was a matter that peculiarly addressed itself to the Legislature. It has acted and the beneficiaries named may not be increased by judicial action."

In the instant case the minor children are not the "children"of the decedent "by adoption" within the meaning of Article 2315. Although they may have been dependent upon decedent for support and affection, they are neither his biological nor his adoptive "children." We therefore can not find that they have a right of action under Article 2315 for his death.

In brief plaintiffs present the following additional arguments:

1. That the minor children even if not the adopted children of decedent suffered no less than if their prospective adoptive father had died after the final decree of adoption than before because they were totally dependent upon him for income, support, guidance and affection;

2. That Mr. and Mrs. Roche had committed themselves twice through contract with the Department of Public Welfare to provide for the care and financial support of the children;

3. That the doctrine of equitable adoption which is recognized in some common law jurisdictions should be applied in this case. See In Re Williams, 348 P.2d 683 (Utah,1961); Bower v. Landa, 371 P.2d 657 (Nev. 1962);

4. That the prospective adoptive children should be treated under the law at least as well as illegitimate children who in Levy v. Louisiana, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.

2d 436 (1968), on remand 253 La. 73, 216 So.2d 818 (1968) were afforded the right to recover for the wrongful death of their mother upon whom they were dependent;

5. That the children should be treated as "posthumous children" who being born after the death of their father are accorded all the legal rights of legitimate children. See La. Code Civ. art. 29 which provides that "children in their mother's womb are considered in whatever relates to themselves as if they were already born. . . ."

We have considered each of plaintiffs' arguments and try as we might to find a legal basis for holding that the minor children have a right of action, we can reach no other conclusion than that the arguments have no merit. None of these equitable considerations, separately or together, serve to make these children the adoptive children of decedent within the meaning of Article 2315. Furthermore the common law cases relying on the doctrine of equitable adoption (which cases represent only two of the common law jurisdictions) are of no assistance in the interpretation of Article 2315. The argument based on Levy v. Louisiana, supra, is also unpersuasive because the holding in that case was based on a finding that the restrictive interpretation of Article 2315 which excluded illegitimate biological children from the class of beneficiaries was invidiously discriminatory on the basis of birth. The children in the instant case are not decedent's biological children; therefore Levy is inapposite.

Plaintiffs' argument that the children should be treated just as would a decedent's posthumous children is possibly their best argument. While we recognize that there is some analogy between a fetus in its mother's womb which is born after the death of its father and a prospective adoptive child whose adoption had been petitioned for but which is scheduled to become final only a month after the prospective father's death, the rule that Article 2315 be strictly interpreted requires

that we not expand the classes of beneficiaries by analogy. Moreover, the analogy between the two is a weak one. In the case of a fetus which subsequent to the father's death is born alive, the father can do nothing to prevent the child's brith or status, unlike the present case in which the decedent Joseph Roche could have withdrawn his consent prior to the final adoption decree. Additionally the posthumous child's being born alive is unaffected by and unrelated to the event which gives rise to its Article 2315 rights--the death of its father. The prospective adoptive child's claim, on the other hand, is directly related to and dependent upon the father's continued concurrence in the adoption, a matter affected by and in fact prevented by his pre-adoption death.

We must next consider the primary issue which prompted our grant of this writ: Whether Mrs. Roche, who does indeed have a right of action for the wrongful death of her husband, must intervene in the suit filed by the decedent's workman's compensation insurer.

The right of an employer or his compensation insurer to seek redress from a third person causing injury to an employee, for which the employee is entitled to compensation,

is established by R.S. 23:1101, et seq. The first paragraph of R.S. 23:1101 recognizes that the exclusive remedy of the employee against his employer for employment related injuries does not affect that employee's right to seek damages from some person other than the employer for his injuries. That statute further provides that the employer may recover any amount which he has paid or has become obligated to pay as compensation to the employee or his dependents.[3]

Under R.S. 23:1102 if either the employer or the employee brings suit against a third person as provided by R.S. 23:1101, the other may intervene:

> "If either the employee or his dependent, or the employer, brings suit against a third person as provided in R.S. 23:1101, he shall forthwith notify the other in writing of such fact and of the name of the court in which the suit is filed, and such other may intervene as party plaintiff in the suit." (emphasis provided)

Footnote 3

Louisiana Revised Statute 23:1101 provides:

> "When an injury or compensable sickness or disease for which compensation is payable under this Chapter has occurred under circumstances creating in some person (in this Section referred to as third person) other than those persons against whom the said employee's rights and remedies are limited in Section 1032 of this Chapter, a legal liability to pay damages in respect thereto, the aforesaid employee or his dependents may claim compensation under this Chapter and the payment or award of compensation hereunder shall not affect the claim or right of action of the said employee or his dependents, relations, or personal representatives against such third person, nor be regarded as establishing a measure of damages for the claim; and such employee or his dependents, relations, or personal representatives may obtain damages from or proceed at law against such third person to recover damages for the injury, or compensable sickness or disease.
>
> Any person having paid or having become obligated to pay compensation under the provisions of this Chapter may bring suit against such third person to recover any amount which he has paid or become obligated to pay as compensation to such employee or his dependents."

Although that statute provides that the other party may intervene as a party plaintiff if either the employee or the employer brings suit against the third person, the jurisprudence holds that an employer's failure to intervene in a suit filed by the employee, after proper notice, bars the employer from bringing a separate suit against the third party tortfeasor. Todd-Johnson Dry Docks v. City of New Orleans, 55 So.2d 650 (Orl. App., 1951); Marquette Casualty Company v. Brown, 235 La. 245, 103 So.2d 269 (1957); National Surety Corporation v. Standard Accident Insurance Company, 247 La. 905, 175 So.2d 263 (1965). No case however has held that an employee's timely filed suit must be dismissed if the employer has pending a previously filed suit for reimbursement of compensation paid.

In Todd-Johnson Dry Docks, Inc. v. City of New Orleans, supra, the court held that an employer's failure to intervene in an employee's previously filed action bars the employer's claim for reimbursement of the benefits paid. That court reasoned that R.S. 23:1102 does not create a "new, independent action based on the compensation paid. [Citations omitted] All that statute does is recognize the fact that as a result of Article 2315 of our Civil Code, an injured employee may collect damages from the third party tort-feasor, and that if he is entitled to such damages the employer may, by pursuing the proper course of action, obtain out of those damages the amount for which he is liable in compensation." That court recognized that it is the employee's cause of action under Article 2315 and that the employer's action is only incidental thereto and only for the amount he has paid in compensation.

Respondent in brief relies upon language in National Surety Corporation v. Standard Accident Insurance Company, supra, to argue that the issue of whether an employee must intervene is settled. In that case the issue presented was

whether a suit by a compensation insurer against the third party tortfeasor interrupted prescription as to a suit filed by the employee more than one year after the accident. There we held that because there is only one cause of action from which both the employee and employer's claim arise, there could be only one prescriptive period and that it was interrupted by the timely filing of suit by the employer. The Court, however, in passing, stated:

> "LSA-R.S. 23:1101, 23:1102, 23:1103, supra, do not set forth whether the injured employee or employer or the employer's insurer shall sue first; when one files suit, however, the other, if he desires recovery must intervene. The intervention is incidental despite that it is filed by the employee. Article 1031, LSA-Code of Civil Procedure, supra." (Emphasis provided)

Although we there stated that the employee's action is "incidental" and that when either the employee or the employer has filed suit first, the other, if he desires recovery, must intervene, that language was unnecessary to our holding and therefore dicta. While the observation that the employee's action was incidental may be relevant to whether prescription was interrupted, it does not bear on the issue of whether a timely filed action by an employee may be dismissed because of a previously filed action of the employer.

One apparent purpose for preferring to require intervention of an employer or an employee into a lawsuit previously filed by the other is to prevent the third party tortfeasor from having to defend two separate lawsuits based on the same delictual and quantum facts. As suggested by the Court of Appeal another reason for allowing intervention is to protect the employer from losing his right to indemnification in the event of a lawsuit by the employee against the tortfeasor. While each of these is a valid purpose, neither is sufficient to require an employee, to whom the cause of action accrues under Article 2315 and who under R.S. 23:1101 has a tort claim, to intervene in an earlier filed action by the employer. It is the employee or his statutory beneficiaries

who have suffered the full loss compensable under Article 2315, not the employer. The employer's right is only a statutory one under R.S. 23:1101 for reimbursement of compensation paid or payable out of the employee's damage claim.

In a case such as this in which the employer filed suit first (December 2, 1976) and the employee chose to file a separate lawsuit (only one day later), if one of the lawsuits has to be dismissed, it makes more sense that it be that of the employer. While many employees may choose simply to intervene where a lawsuit has already been filed by the employer, the employee who timely files a separate action should not be required to do so, and indeed is not required to do so under R.S. 23:1102 which provides simply that either party may intervene. If an employee files suit for damages from the third party tortfeasor, an employer seeking reimbursement of compensation paid must intervene in the pending lawsuit, as per Todd-Johnson, supra, and as per the dicta in National Surety, supra. That jurisprudence as it relates to the employer's second filed suit is unaffected by our decision here. We hold in this case that if an employer files suit first, the employee may still maintain a separate action for his damages and need not intervene in the employer's pending lawsuit. All that we must do, and are doing here, to resolve the legal issue before us is to find that the trial court erred in dismissing Mrs. Roche's timely suit filed separately from the earlier filed employer suit. Her suit should not have been dismissed, be it with or without prejudice.

We are mindful that our holding in this case coupled with the incongruity of R.S. 23:1101's recognition of rights of both the employer and the employee, and R.S. 23:1002's provision for permissible intervention may result in multiple lawsuits involving single claims. Because in the instant case both the employer and the employee's claims were timely filed

in the same district court (the Fifteenth Judicial District Court), consolidation of the two lawsuits and treatment of the employer's action as an intervention will solve the problem in this case.[4]

And while we are tempted to prescribe a procedural solution in the situation in which two lawsuits are filed in two different courts, each of proper venue,[5] we conclude that such resolution would be dicta here and legislative in nature. It is therefore best left to the Legislature to solve this problem.[6]

Decree

For the foregoing reasons the judgments of the district court and the Court of Appeal are affirmed insofar as they dismissed the action brought on behalf of the minor children; the judgments of the district court and the Court of Appeal dismissing Mrs. Roche's action and requiring her to intervene in the previously filed lawsuit of Liberty Mutual are reversed and the two lawsuits No. 40,722 and No. 40,732 in the Fifteenth Judicial District Court are ordered consolidated. The case is remanded to the district court for further proceedings consistent with this opinion.

JUDGMENTS AFFIRMED IN PART; REVERSED IN PART; REMANDED.

X X X

Footnote 4

Consolidation of two separate suits involving a common issue of law or fact pending in the same court is provided under Article 1561 of the Code of Civil Procedure:

> "When two or more separate suits involving a common issue of law or fact are pending in the same court, the court, at any time prior to trial, may order the consolidation of the suits for trial or may order a joint trial of any of the common issues."

Footnote 5

For instance one solution might be to provide that where the employer's statutory claim for compensation reimbursement is first filed, a suit filed by the employee within the prescriptive period in a court of proper venue shall not be subject to being dismissed on exceptions and shall not be affected by the disposition of the employer's suit. The employer's earlier filed suit in this latter instance might, however, be subject to being transferred and consolidated with the employee's suit as though it

Footnote 5 continued at page 12

Footnote 6 appears at page 12

Footnote 5 continued

were an intervention. For a comparable provision to transfer from one district court to another see Article 123 Code of Civil Procedure.

Footnote 6

The problem is caused by R.S. 1101's recognition of distinct claims of the employer and the employee arising out of a single accident and R.S. 1102's provision that either the employer or the employee may rather than must intervene in the earlier filed lawsuit.

SUPREME COURT OF LOUISIANA

NO. 65,285

ALICE C. ROCHE, ET AL

V.

BIG MOOSE OIL FIELD TRUCK SERVICE, ET AL

MARCUS, Justice (concurring)

In my view, it is inconsistent to hold that, if an employee files suit for damages against a third party tort feasor, an employer seeking reimbursement of compensation must intervene in the pending lawsuit, yet where an employer files suit first, the employee may still file a separate action for damages and need not intervene in the employer's pending suit. Accordingly, I respectfully concur.

FEB 15 1980

SUPREME COURT OF LOUISIANA

NO. 65,285

ALICE C. ROCHE, ET AL.

VERSUS

BIG MOOSE OIL FIELD TRUCK SERVICE, ET AL.

DENNIS, Justice, dissenting in part and concurring in part.

I respectfully dissent from the majority's opinion that the children have no cause of action.

I question whether 2315's listing of wrongful death beneficiaries is exclusive thereby denying these children recovery. In the case of King v. Cancienne, 316 So.2d 366 (La. 1975) we held that a putative spouse would not be deprived of recovery under 2315 for the wrongful death of her putative husband even though she did not technically fit within any of the categories of 2315. As a partial basis for the decision, Justice Barham outlined the history of wrongful death in Louisiana and in France. He noted that "Under French law . . . any person suffering from the loss or disappearance of the victim by death has an independent right of action for his own loss." King, supra, 316 So.1d at 368. He observed:

> "Our Article 2315 is drawn directly from French law . . . . The purpose of that provision in France and in Louisiana was to provide an action for personal damage resulting from the death of another through the delictual action of a third party. The legal right and cause of action of one injured by loss

> of economic aid or love and affection was independent of any action which the deceased might have had . . . . " King, supra, 316 So.2d at 369.

In King, the issue of whether the listing of beneficiaries in 2315 is exclusive or illustrative was recognized but not addressed. It has been long held that the article must be strictly construed and that, therefore, the listing must be exclusive. See Chatman v. Martin, 245 So.2d 423 (La. App. 2d Cir. 1971) and the authorities cited therein. However, the basis for this ruling is faulty. While in France the wrongful death action was recognized, the Common Law of England maintained that the death of a human being did not create a cause of action on behalf of a living person injured because of the death. However, in 1846 Lord Campbell's act was passed giving such a cause of action in limited circumstances. This provision being statutory law, it was in derogation of the common law and as such fell under the rule of requiring strict construction. Johnson, Death on the Callais Coach: The Mystery of Louisiana Wrongful Death and Survival Actions, 37 La. L. Rev. 1, 4-6 (1976). However, our legal background and traditions are civilian. As Professor Johnson astutely commented,

> "Article 2315 is not in derogation of common law; it is not in derogation of anything. There was no reason at all to adopt the common law maxim of strict interpretation of statutes which departed from the common law. And yet, for years and years, the Louisiana jurisprudence has confidently concluded that the article has to be strictly construed, when in fact there is no reason to interpret the article in a different fashion from any other article or statute." Johnson, supra, 37 La. L. Rev. at 7.

Because of the wrongful act of another of the children in the present case were injured. They were deprived of support, love and affection, and of a father. Although they may not fit technically within any of the

present categories of 2315 I believe that an examination of the purpose of the statute would require that person who caused the damage to repair it.

Moreover, the majority's interpretation of Article 2315 renders it unconstitutional.

Although I appreciate the difficulty in conceptualizing a class including the children, it seems to me that dependent minors undergoing virtually certain adoption, absent the death of the adoptive parent, do form a legitimate category deserving of equal protection of the laws—at least as deserving as independent major illegitimate children who may have never known their deceased parent. If the majority's interpretation of Article 2315 is correct, it arbitrarily, capriciously or unreasonably discriminates against the prospective adopted children because of their birth, La. Const. Art. 1, § 6, there being no rational basis to support such discrimination.

I join fully in the balance of the majority opinion.

* * *

Supreme Court of Louisiana

NEW ORLEANS, 70112

On the 7th day of April, 1980, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

REHEARING GRANTED:

64,987 State v. James C. Williams
delaHoussaye, J.ad hoc takes no part.

REHEARINGS DENIED:

65,325 Nash v. Knobloch, et al
DIXON, C.J., CALOGERO & DENNIS, would grant a rehearing.

65,439 State v. McIntyre
DENNIS, J., would grant a rehearing.

65,285 Roche, et al v. Big Moose Oil Field Truck Service, et al
DENNIS, J., would grant a rehearing.

65,342 State v. Russel

64,974 First National Bank of Crowley v. Green Garden Processing, et al
CALOGERO, DENNIS, & WATSON, J.J., would grant a rehearing.

65,231 State v. Bell
MARCUS, BLANCHE, J.J. & delaHoussaye, J.,ad hoc would grant a rehearing.

63,142 Cleco v. Louisiana Public Service Commission
(2 applications)

65,647 State v. Morman
CALOGERO & DENNIS, J.J., would grant a rehearing.
WATSON, J., would grant for the reasons assigned.

64,875 State v. Simmons
CALOGERO, J., would grant a rehearing for the reasons expressed in his dissent.
DENNIS, J., would grant a rehearing.

65,614 State v. Humphrey
DENNIS, J., would grant and assigns reasons.
DIXON, C.J. & CALOGERO J. concur in the denial; they would grant except that the other offenses may be relevant to overcome a defense of accident.

65,767 Gulf States Utilities v. LPSC

65,628 State v. Jones

65,179 State v. Lukefahr, et al
WATSON, J., would grant a rehearing.

65,635 May v. Market Insurance Co., et al

65,744 State v. Tomasetti

65,765 State v. Albert

65,813 State v. Johnson
CALOGERO & DENNIS, J.J., would grant a rehearing.

65,833 State v. Williams

66,024 League of Women Voters v. City of New Orleans
DIXON, C.J. & DENNIS, J., would grant a rehearing.

64,328 Kaplan v. University Lake Corp., et al

(continued)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

ALICE C. ROCHE, ET AL, Appellant,

V.

BIG MOOSE OIL FIELD TRUCK SERVICE, ET AL, Appellee

Appeal from the Supreme Court of Louisiana

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that ALICE C. ROCHE, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Louisiana dismissing the wrongful death cause of action on behalf of her minor children entered in this action on February 15, 1980 and rehearing denied on April 7, 1980.

This appeal is taken pursuant to 28 USC Section 1257(2).

SHELTON AND LEGENDRE
ATTORNEYS AT LAW
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BY: THOMAS F. PORTER, IV

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-6630

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ALICE C. ROCHE, ET AL, Appellant,

V.

BIG MOOSE OIL FIELD TRUCK SERVICE, ET AL, Appellee

Appeal from the Supreme Court of Louisiana

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Appellant, ALICE C. ROCHE, moves the Court for an order permitting her to proceed in this Court, in forma pauperis, with her appeal from the judgment of the Supreme Court of the State of Louisiana entered in this cause on February 15, 1980, and rehearing denied on April 7, 1980, pursuant to the provisions of Title 28, United States Code, Section 1915, and Rule 53 of the Rules of this Court, and in support thereof attaches the affidavit of said appellant.

Appellant's statement as to jurisdiction is being filed with this motion and appellant's affidavit.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

ALICE C. ROCHE, ET AL, Appellant,

V.

BIG MOOSE OIL FIELD TRUCK SERVICE, ET AL, Appellee

AFFIDAVIT OF ALICE C. ROCHE

United States of America :
State of Louisiana :
Parish of Lafayette :

ALICE C. ROCHE, being duly sworn, deposes and says:

1. I am a citizen of the United States and the plaintiff in the above-entitled action on behalf of my minor children.

2. I desire to prosecute an appeal from the judgment entered by the Supreme Court of the State of Louisiana, on February 15, 1980, and rehearing denied on April 7, 1980, pursuant to 28 U.S.C. Sec. 1257(2), but because of my poverty I am unable to pay the costs of such appeal or give security therefor and still be able to provide myself and my dependents with the necessities of life.

3. I believe that I am entitled to the redress I seek by such an appeal, and that such an appeal presents substantial federal questions.

The nature of the questions to be presented upon such appeal is as follows:

Whether LSA - Civil Code Article 2315, which deprives individuals of the right to recover for the wrongful death of another individual on whom they were totally dependent for their subsistence, violates the Equal Protection Clause of the Fourteenth Amendment.

I contend that the Supreme Court of the State of Louisiana erred in holding that the denial of a right of action on behalf of the two minor children for the wrongful death of Joseph D. Roche, pursuant to LSA - Civil Code Article 2315, was not discriminatory or unconstitutional.

WHEREFORE, affiant prays that she may have leave to proceed in this Court on appeal in forma pauperis.

Alice C. Roche

ALICE C. ROCHE

SWORN TO AND SUBSCRIBED before me this 12th day of May, 1980.

Norman J. Roche

NOTARY PUBLIC